IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1017

JAMES A. RHODES,
Petitioner

v.

ARTHUR KRAUSE, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S REPLY MEMORANDUM

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We submit this reply to discuss two significant decisions rendered by this Court since the Petition of Certiorari was filed, and to discuss plaintiffs' threat that "review of the defendants' issues at this time would bring before the Court the numerous other issues presented by plaintiffs in the Court of Appeals, and would require this Court to review the extensive record in this case to resolve all these issues." (Opp. 4)[1]

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[1] "Opp." refers to the plaintiffs' Brief in Opposition in this case (No. 77-1017) and its companion (No. 77-1018). "Pet." refers to the Petition for Certiorari in this case.

I.

A. *Procunier* v. *Navarette*, noted at Pet. 22 n.9, has now been decided, 46 U.S.L.W. 4144 (Feb. 22, 1978). That decision both refutes plaintiffs' contention that the second question presented by the Petition—whether the direction of a new trial as to Governor Rhodes is consistent with *Scheuer* v. *Rhodes*, 416 U.S. 232—presents an issue of fact, and also reinforces our view that the Court of Appeals' resolution of that issue was erroneous.

First, *Procunier* determined that the defendants "were entitled to judgment as a matter of law" on the only count that was before the Court. (Slip Op. 7). This suffices to dispose of respondents' principal contention (Opp. 21, 30) that petitioner is seeking review only of the resolution of an issue of *fact* by the Court of Appeals.[2]

Second, *Procunier* confirmed and elaborated upon the qualified immunity test declared in *Scheuer* v. *Rhodes*, 416 U.S. 232 and *Wood* v. *Strickland*, 420 U.S. 308. It held that the defendants had satisfied the first part of the *Wood* rule on the ground that "[w]hether the state of the law is evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local

[2] That the issue is one of law rather than fact is not the only reason that plaintiffs' invocation of the "two-court" Rule (Opp. 22) is misplaced. For aught that appears from the District Court's explanation (quoted *id.*), it denied Governor Rhodes' motion for a directed verdict only because of its view that there was sufficient evidence for the jury to impose liability on him for violating the plaintiffs' First Amendment rights. By eliminating the First Amendment claim the Court of Appeals narrowed the issue to whether Governor Rhodes can be held liable for the National Guard's use of "excessive force" against plaintiffs, a limitation that the plaintiffs' argument ignores, see Opp. 24-26. Thus, only the Court of Appeals even decided the immunity question presented by Governor Rhodes' Petition; but its opinion contains nothing which would enable this Court to determine that it properly applied the *Scheuer* and *Wood* standards; and of course the case was decided below without the benefit of this Court's reasoning in *Procunier*.

District Court, there was no clearly established First and Fourteenth Amendment right with respect to the correspondence of convicted prisoners" when the defendants acted. (Slip Op. 9-10). So here, even if, notwithstanding *Paul* v. *Davis*, 424 U.S. 693, it remains open to plaintiffs to contend that they had a right under the due process clause which was violated, they surely cannot maintain that such a right had been "clearly established" in May, 1970.[3]

The *Procunier* decision also sustained the immunity defense "under the second branch of the *Wood* v. *Strick-*

[3] Of the cases cited by plaintiffs (Opp. 28-30) only *Screws* v. *United States*, 325 U.S. 91 and *Monroe* v. *Pape*, 365 U.S. 167 were decided by this Court. *Monroe* involved "the guarantee against unreasonable searches and seizures contained in the Fourth Amendment * * * made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment." 365 U.S. at 171. *Screws* involved the treatment of a prisoner, rather than the alleged use of excessive force to deal with an ongoing offense. Moreover, the purpose and effect of the beating which was inflicted on the victim in *Screws* was to prevent him from enjoying the due process right to a trial for the crime for which he had been arrested; it was that right, which is not involved here, which brought the Due Process Clause of the Fourteenth Amendment into play. *Screws* is thus entirely consistent with the interpretation of the Fourteenth Amendment in *Paul* v. *Davis*, that the Due Process Clause provides "procedural guarantees" (424 U.S. at 701, quoted at Pet. 15). Plaintiffs studiously ignore this portion of the opinion in their discussion of the first question presented—whether plaintiffs were deprived of life, liberty or property without Due Process of Law.

With respect to *Stengel* v. *Belcher*, 522 F.2d 438, the only Sixth Circuit case cited by plaintiffs, it suffices to say that it was decided five years *after* the events here in question. Indeed, since the cases from "ten of the eleven circuits" cited at Opp. 28-29 arose under a wide variety of circumstances and imposed liability on several mutually inconsistent constitutional theories, the only lesson which they teach is that suits under § 1983 which charge the use of "excessive force" are so frequent, and the reasoning of the lower courts is in such disarray, that if *Paul* v. *Davis* has not already established a controlling principle, review should be granted to further clarify when the use of such force constitutes the invasion of a constitutional right. The phrases "misuse of power" and "raw abuse of power" which plaintiffs invoke (Opp. 29) do not guide the decision-making process so much as describe the conclusion.

land standard, which would authorize liability where the official has acted with malicious intention to deprive the plaintiff of a constitutional right or to cause him other injury." (Slip Op. 10). The Court explained: "This part of the rule speaks of intentional injury, contemplating that the actor intends the consequences of his conduct. See Restatement (Second) of Torts, § 8A." (*Id.* at 10-11.) The Court contrasted conduct whereby although "the actor has subjected the plaintiff to unreasonable risk, he did not intend the harm or injury that in fact resulted. See *id.*, § 282 and comment d." (*Id.* at 11.) The arming of the National Guard, and the Ohio Rules of Engagement (the only matters on which plaintiffs rely apart from the alleged decision to ban all assemblies) may have "subjected the plaintiff[s] to unreasonable risk" but, even if otherwise attributable to Rhodes are far from evidence that he "intend[ed] the harm or injury that in fact resulted". Indeed, while they recite the litany that defendants Rhodes and Del Corso "made various decisions and took various actions which were intentional, wanton, reckless or negligent" (Opp. 24), even plaintiffs do not contend that these defendants intended that any students would be killed or otherwise physically injured.

B. In urging review of the Court of Appeals' direction of a new trial because a juror had been threatened, petitioners in this case and in No. 77-1018 (where the reasons for review on this point are discussed) urge that the Court of Appeals exceeded the scope of its appellate authority. See particularly our formulation of the juror issue in questions 3(a) and (b) at Pet. 2. The Court addressed this very point in *Arizona* v. *Washington*, 46 U.S.L.W. 4127 (February 21, 1978), although in a somewhat different context:

> "There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. He has seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more 'conversant with the factors relevant to the determination' than any reviewing court can possibly be. See *Wade* v. *Hunter*, 336 U.S., at 687." (Slip op. 16-17, footnote omitted).

By a parity of reasoning, the Court of Appeals should have deferred to the trial court's determination that the threat to a juror did not infect the verdict, or at most should have remanded the case for a hearing after which the trial court could make a further evaluation of the impact on the juror. Review of the issue should be granted in the exercise of this Court's supervisory power.

II.

Plaintiffs declare that if defendants' Petitions for a Writ of Certiorari are granted, they will raise, as respondents, a multitude of issues unrelated to the questions presented for review. This *in terrorem* argument ignores the well-established limitations on the ability of a respondent to thrust new issues upon this Court.

First, "absent a cross-petition for certiorari, the respondent may not now challenge the judgment of the Court of Appeals to enlarge its rights thereunder. *Morley Constr. Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 190; *United States* v. *American Railway Express Co.*, 265 U.S. 425, 435." *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401, n.2. That proposition is applicable to all of the issues which plaintiffs recite at Opp. 4-5, for each would, if sustained, enlarge plaintiffs' rights under

the Court of Appeals' judgment.[4] Moreover, even where this Court has jurisdiction to entertain a respondent's issues it often declines to do so where they are not "of sufficient general importance to justify the grant of certiorari." *United States* v. *Nobles*, 422 U.S. 225, 241-242, n. 16. See also, *e.g.*, *United States* v. *ITT Continental Baking Co.*, 422 U.S. 223, 226-227, n. 2, approved on this point by the dissenting opinion, *id.* at 244, n. 2. *Nobles* is particularly in point, for there the Court of Appeals had granted a new trial and this Court reversed, reinstating the District Court's judgment, without passing on the respondent's alternative grounds for granting a new trial. Since none of respondents' points is independently worthy of this Court's attention,[5] adherence to this rule of practice will protect the Court from considering them if it grants review of the meritorious and important questions presented by Governor Rhodes.

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[4] The first two enumerated issues would result in judgment in plaintiffs' favor rather than a new trial; a decision in their favor on the third enumerated point and the evidentiary issues would alter the terms of the new trial by circumscribing the trial court's discretion.

[5] Plaintiffs have in fact filed a Cross-Petition to review the judgment below, in *Krause* v. *Rhodes*, No. 77-1022. They there raise only the First Amendment issue, which bespeaks their own understanding that the other issues described in their Brief in Opposition herein fail to satisfy the standards of Rule 19. The Brief in Opposition for Cross-Respondent in No. 77-1022 demonstrates that the Court of Appeals' rejection of plaintiffs' First Amendment claim likewise raises no issue meriting review by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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